



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.109 OF 2016**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....1<sup>ST</sup> PETITIONER**  
**NYAKINA WYCLIFFE GISEBE.....2<sup>ND</sup> PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**  
**ETHICS AND ANTI-CORRUPTION COMMISSION.....3<sup>RD</sup> RESPONDENT**  
**NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. In their Petition dated 29<sup>th</sup> March 2016, the Petitioners pray that this Honourable Court be pleased to make the following declarations and issue the following orders:

- a. A declaration that under the Constitution, the enforcement of criminal law is the exclusive mandate of the National Police Service.***
- b. A declaration that the mandate given to the Ethics and Anti-Corruption Commission (EACC) in Article 79 as read with Article 252 of the Constitution to ensure compliance with, and enforcement of the provisions of Chapter Six of the Constitution, does NOT empower the Commission to enforce criminal law, including conducting criminal investigations.***
- c. A declaration that Parliament violated Article 93 (2) of the Constitution by enacting Sections 23, 24, 25, 25 A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56 B, 56 C, 72 and 73 of the Anti-Corruption and Economic Crimes Act (ACECA) 2014, Cap 65 and Subsections 11 (d) and (k) of the EACC Act, 2011.***
- d. A declaration that Sections 23, 24, 25, 25 A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56 B, 56***

***C, 72 and 73 of ACECA and Subsections 11 (d) and (k) of the EACC Act, 2011 are unconstitutional and therefore null and void and of no purpose in law.***

***e. A declaration that the EACC should hand over to the Directorate of Criminal Investigations all matters of criminal law enforcement, including the criminal investigations that it is handling.***

***f. A declaration that the EACC should hand over to the National Police Service the assets it has established for conducting criminal investigations.***

***g. A declaration that the National Police Service should reclaim its exclusive mandate of investigating all crime.***

***h. A mandatory order ordering the EACC to hand over to the Directorate of Criminal investigations all matters of criminal law enforcement, including the criminal investigations that it is handling.***

***i. A mandatory order ordering the EACC to hand over to the National Police Service the assets it has established for conducting criminal investigations.***

***j. A mandatory order ordering the National Police Service to reclaim its exclusive mandate of investigating all crime.***

***k. Any other order or further remedy that the Court shall deem fit to grant in the interests of justice in the circumstances of this Petition.***

***- An order that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents bear the costs of this Petition for being the parties that are directly responsible, through actions and / or omissions, for the violations of the Constitution and the laws which necessitated the Petitioner to seek remedy in this Honourable Court.***

2. The Petitioners' prayers are premised on among others, the following grounds:

***a. During the review process which culminated in the Constituion of Kenya, 2010, the drafters of the Constitution, in the final draft thereof that was ratified through the national referendum, deliberately whittled down the powers and functions of the EACC, denying it the powers to conduct criminal investigations, including as provided for in the ACECA, by expressly limiting its mandate to the human resource function of enforcing the code of conduct for public officials as enshrined in Chapter Six of the Constitution.***

***b. The deliberate failure to deny the EACC the powers to conduct criminal investigations means that the drafters, in line with Articles 157 (4) and 245 (4) (a) & (b) of the Constitution wished to vest all powers to investigate crime exclusively in the National Police Service.***

***c. In accordance with the Constitution, the Commission may receive and investigate complaints about non-compliance with the code of conduct in Chapter Six but where a crime is suspected or has been committed, it must refer the issue to the National Police Service for criminal investigations.***

***d. given to enforce criminal law.***

***e. Under the Constitution and the National Police Service Act, 2011, the National Police Service is charged throughout the country with, inter alia, the maintenance of law and order, the investigation of crimes, the prevention and detection of crime, the collection of criminal intelligence, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.***

*f. The state of affairs where those who abuse their offices and steal from the public go scot-free is unacceptable.*

*g. Allowing the EACC to enforce criminal law, especially with some police officers assigned to the Commission, creates a challenge of command to the National Police Service, and responsibility for the failure to rein in the runaway theft and abuse of public resources. But above all, it contravenes very clear provisions of the Constitution, that criminal law enforcement is the exclusive mandate of the National Police Service.*

*h. Whereas the EACC has no mandate to investigate crimes, it has a mandate to ensure that criminal investigations by the Police and criminal prosecutions by the Director of Public Prosecutions (DPP) and decisions in the Judiciary are not compromised by improper motive or for corrupt purposes.*

3. In the above context, **Article 79** of the **Constitution** provides:

*“Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.”*

4. **Article 93** of the **Constitution** provides:

*“(1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.*

*(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.”*

5. **Articles 157 (4)** of the **Constitution** provides:

*“The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”*

6. **Article 252** of the **Constitution** provides:

*“(1) Each commission, and each holder of an independent office—*

*a. may conduct investigations on its own initiative or on a complaint made by a member of the public;*

*...*

*(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.”*

7. **Articles 245 (4) (a) & (b)** of the **Constitution** provide:

*“The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—*

*a. the investigation of any particular offence or offences;*

*b. the enforcement of the law against any particular person or persons; or...*”

8. The sum of the Petitioner's case is therefore that since no provisions of **Chapter Six** of the **Constitution** involve the enforcement of criminal law, the EACC's mandate does not include criminal law enforcement, which, as provided for in the **Constitution**, must remain the preserve of the **National Police Service, (the DPP)** and the **Judiciary**.

9. By the instant Application in the above regard, the Petitioners prays that this Honourable Court be pleased to certify that the Petition hereto raises a substantial question of law and forthwith refer the case to the Chief Justice for appointment of a bench of three or five Judges to determine it. The prayer is based on **Article 165 (4)** of the **Constitution**, which provides thus:

***“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”***

### **The Petitioners' Case**

10. The Petitioners' case is found in their Notice of Motion Application dated 29<sup>th</sup> March 2016, an affidavit deponed by Mr. Okiya Omtatah Okoiti, also dated 29<sup>th</sup> March 2016 and written submissions dated 29<sup>th</sup> May 2016.

11. The Petitioners submit that the instant Petition meets the objective standard by which the discretion of this Court can be judicially exercised to certify the Petition as raising a substantial question of law.

12. The Petitioners also submit that although the expression “substantial question of law” is not defined in the **Constitution**, it is possible to discern the true meaning thereof from the **Constitution** itself, and from various judicial pronouncements from other jurisdictions.

13. Relying on the case of **Sir Chunilal V. Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd 1962 SC 1314**, the Petitioners submit that the test to determine whether a substantial question of law has been raised involves determining: whether directly or indirectly, the issue affects the substantial rights of the Parties; whether the question is of general public importance; whether it is an open question in the sense that the matter has not been settled by pronouncement of the highest Court in the land; that the issues are not free from difficulty; and that the issue calls for discussion for alternative views.

14. Also, relying on the cases of **M/s Neek Ram Sharma & Co. v income Tax Appellate Tribunal & Others, High Court of Jammu & Kashmir OWP (IT) 823, 2000** and **Hero Vinoth v Seshammal, Civil Appeal 4715 of 2000**, they further submit that a question will be considered to be a substantial question of law if it has not been settled through binding precedents, involves debatable legal issues and is not covered by any specific provisions of law.

15. In addition, that the term “substantial question of law” is fairly ambiguous but possible interpretations include: any case involving interpretation of the **Constitution**; any case that turns on interpretation of the **Constitution**; a case of general importance to the country; and a new/novel question of interpretation of the **Constitution**.

16. Further, according to the Petitioners, a substantial question of law does not mean one of general importance but simply means matters in which the case would turn on interpretation of the **Constitution** and in this respect, the disposal of the Petition before the Court, on its merits, turns on this Court's seminal interpretation of the **Constitution**.

17. According to them therefore, the questions of interpreting **Articles 79, 157 (4) & (11), 201 (d), 254 (2) (a), 4 (a) & (b)** and **259 (1)** and **Section 7 (1)** of **Schedule Six**, to determine the constitutional validity of **Sections 23, 24, 25, 25 A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56 B, 56 C, 72** and **73** of the **ACECA** and **Subsections 11 (d) and (k)** of the **EACC Act**, have never been determined before, rise in a novel way and should be interpreted in the context of a bench of an uneven number judges.

18. Noting that this Court is not bound by the decisions of other High Court judges, the Petitioners impugn the decision of Majanja J in **J Harrison Kinyanjui v The Hon. Attorney General and Judicial Service Commission and 19 Others, H.C.C at Nairobi, Petition No. 74 of 2011** where, they submit, Majanja J rendered a managerial decision on **Article 165 (4)** based on faster dispensation of justice in consideration of judicial resources, rather than a judicial decision based on the merits of the case and the principles of **the Constitution** which include sovereignty of the people, supremacy of the Constitution, the Bill of rights and the independence of the judiciary.

19. The Petitioners conclude by reiterating that their Petition does indeed raise a substantial question of law requiring the empanelment of a bench of an uneven number of Judges to hear and determine it.

### **The Respondent's Case**

20. None of the four Respondents in this matter has in any way (written or otherwise) objected to or supported the facts and evidence provided by the Petitioners in support of the present Application.

### **Determination**

21. The question before me is whether the Petitioners, as parties to this matter, have demonstrated that a substantial question of law arises from the Petition in order to allow me to make a referral to the Chief Justice in terms of **Article 165 (4)** of the **Constitution**.

22. The Petitioners emphasise that **Article 165 (4)** requires that for the first time, any question of constitutional interpretation should be heard by a bench of an uneven number of Judges; at least three, and that the instant Petition involves a substantial question of law, concerning the basic structure of the **Constitution**, requiring seminal interpretation of the **Constitution**, since there are no settled principles whose mere application would determine the matter.

23. In that regard, the Petitioners correctly note that the **Constitution** provides no definition for the term "substantial question of law." Indeed in the case of **In Community Advocacy Awareness Trust & Others v The Attorney General & Others High Court Petition No. 243 of 2011**, the High Court, observed as follows:

*"The Constitution of Kenya does not define, 'substantial question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges, not being less than three, to determine a matter."*

24. They also correctly note that judicial pronouncements from other jurisdictions serve to provide pertinent guidance on the same. That is why in the case of **Sir Chunilal V. Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd 1962 SC 1314**, the Supreme Court of India determined the term thus:

*"A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial."*

25. Similarly, in the Indian case of **Hero Vinoth v Seshammal Civil Appeal 4715 of 2000**, to which the Petitioners refer, the Court held thus:

*"A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it*

*is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court ... has decided the matter, either ignoring or acting contrary to such legal principle.”*

26. Here in Kenya, in the case of **In Community Advocacy Awareness Trust & Others v The Attorney General (supra)**, the Court opined thus in consideration of Kenya’s new constitutional dispensation, shortly after promulgation of the **Constitution of Kenya, 2010**:

*“...it would follow, that every question concerning our Constitution... would be a substantial question of law. Each case that deals with the interpretation of the Constitution...would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest Court.”*

27. In addition, in the case of **Martin Nyaga and Others v Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR**, the Court articulated that the principles applicable when making a declaration under **Article 165(4)** include: whether the matter is complex; whether the matter raises a novel point; whether the matter by itself requires a substantial amount of time to be disposed of; the effect of the prayers sought in the Petition; and the level of public interest generated by the Petition.

28. Regarding the above, this Court in **Okiya Omtatah Okioti v Independent Electoral and Boundaries Commission & 3 others [2016] eKLR** held thus:

*“...although factors such as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question of law, the Courts have also indicated that none of these factors is singly decisive and that the list is not exhaustive.”*

29. In addition the Court in the case of **Hon. Chemutut and 3 others v The Attorney General and 3 others, Milimani Petition No. 307 of 2014** observed thus:

*“It must also be remembered that each High Court judge, has authority under Article 165 of the constitution to determine any matter that is within the jurisdiction of the High Court. There is a right of appeal to the Court of Appeal and by virtue of Article 163(4) of the Constitution, an appeal as of right to the Supreme Court on Constitutional matters, there must be something more to the substantial question than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts of the application of well-settled principled to the facts of a case.”*

30. I also note that although one may be in agreement with the above descriptions, as I am, they only serve to offer appropriate guidance. That is why Onguto J in **Del Monte Kenya Limited v County Government of Muranga & 2 others [2016] eKLR** held thus:

*“the question as to whether there exists a substantial question of law, even if one adopted the definition in the Chunilal Mehta case, is left to the individual judge to determine depending on the circumstances and unique facts of each case.”*

31. While I therefore agree that each case must be considered on its merits, and I have so held in the case of **Okiya Omtatah Okioti v Independent Electoral and Boundaries Commission & 3 Others [2016] eKLR**, I resolve that considerations of dispensing of justice without delay should not be called into account with the results that Applications under **Article 165 (4)** of the **Constitution** are then dismissed. This is because, in my view, any decision on whether a matter raises substantial questions of law should be, even though the Constitution is contemplated, taken after considerations that are confined to the merits of that very same matter that is before the Court.

32. In that context, on closer perusal of the Petition presented by the Petitioner, and as articulated by the Petitioners in their pleadings, I supplement that the issues in the Petition include but are not limited to:

- a. Whether under the **Constitution** the enforcement of criminal law is the exclusive mandate of the National Police Service.
- b. Whether the mandate given to the EACC in **Article 79** as read with **Article 252** to ensure compliance with, and enforcement of the provisions of **Chapter Six** empowers the EACC to enforce criminal law, including conducting criminal investigations.
- c. Whether Parliament violated **Article 93 (2)** of the **Constitution** by enacting **Sections 23, 24, 25, 25 A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56 B, 56 C, 72 and 73** of the **ACECA** and **Subsections 11 (d) and (k)** of the **EACC Act**.
- d. Whether **Sections 23, 24, 25, 25 A, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 56 B, 56 C, 72 and 73** of the **ACECA** and **Subsections 11 (d) and (k)** of the **EACC Act** are unconstitutional and therefore null and void and of no purpose in law.
- e. Whether the **National Police Service** should reclaim its exclusive mandate of investigating all crime and enforcing criminal law.

33. These issues raise questions surrounding the mandate of the EACC particularly with regard to investigation of corruption, the constitutionality of the Sections in the **EACC Act** that concern the investigative mandate of the Commission, the Constitutionality of Parliament in passing the impugned Sections in the **EACC** and the **ACECA legislation**, and finally, the role of the National Police Service in investigating corruption, especially in the context of an existing national anti-corruption institution.

34. It is a matter of judicial notice that corruption is a major contributor to overall bad governance in Kenya. It distorts the economy and causes the social fabric of the Country to break down. Apart from leading to overall disregard for the rights of citizens, especially the poor, corruption also leads to discrimination, non-delivery of essential services to the population, and to systemic rot in the public institutions that are intended to better the lives of all persons in the country.

35. In the above context, the **Constitution of Kenya, 2010** established an independent anti-corruption commission, the EACC, to lead the fight against corruption in all sectors in the country and to establish standards for integrity for public officers in particular, but also for the entire Kenyan population. Being independent, the EACC is intended to not only act fast to fight corruption but to have greater credibility and accountability while fighting corruption.

36. On its website, the EACC has as its mandate, *“To combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption.”* **Sections 13 (1) and (2)** of the **EACC Act**, also on its mandate, provide thus:

***“(1) The Commission shall have all powers generally necessary for the execution of its functions under the Constitution, this Act, and any other written law.***

***(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to***

- a. ***Educate and create awareness on any matter within the Commission’s mandate;***
- b. ***Undertake preventive measures against unethical and corrupt practices;***
- c. ***Conduct investigations on its own initiative or on a complaint made by any person, and,***
- d. ***Conduct mediation, conciliation and negotiation.”***

37. There is debate as raised in the Petition whether Anti-corruption agencies with investigative powers

are better placed to actualise the fight against corruption. There is also debate whether anti-corruption strategies become more challenging to realise when investigative and other powers of anti corruption agencies (such as the power to prosecute) are divided between the agencies and other institutions such as the Police.

38. The aforementioned (and others) are unexplored issues and questions that the Court needs to resolve, and with intention, provide definitive responses thereto, in consideration of the persisting circumstances at the time of drafting the **Constitution**, the intention of the drafters of the **Constitution**, the provisions of the **Constitution** and the spirit of the **Constitution** as a whole.

39. Apart from their uniquely novel nature and not having been settled in law, the issues and questions are weighty and may therefore, on examination, invoke different opinions. It is evident from the above that the Petition, by virtue of its issues, clearly raises substantial questions of law.

40. The Petitioners also argue that a substantial question of law is not necessarily one of general importance. On this subject, Onguto J in **Del Monte Kenya Limited v County Government of Muranga & 2 others [2016] eKLR** held thus:

*“where the Petition raises or deals with an issue of public importance then the balance tilts in favour of empanelment especially if it is also an issue, the determination whereof would affect the rights of both the individual parties as well as the public at large or it is an issue which is yet to be determined and settled by the court or a court superior in hierarchy.”*

41. Similarly, this Court in **Kalpna H Rawal v Judicial Service Commission & 3 others [2015] eKLR** held thus:

*“I should reiterate that the public importance of a matter is a consideration in determining whether a substantial question of law has been raised.”*

42. I am in agreement with the above holdings and I am still of the same view. I am however in disagreement with the Petitioners on their argument and resolve that any matter that encompasses issues that affect more persons than the Petitioner who brings the matter before the Court, would likely be of public importance and may present a substantial question of law on that basis. Each case must be looked at in its own context.

43. In this context, the proper investigation and prosecution of corruption and corruption related acts is undeniably a matter of public importance. For this and the above reasons, this Petition, I determine is one that raises substantial questions of law.

### **Conclusion**

44. In light of the foregoing, I am satisfied that the issues raised in the instant Petition are not only novel and unsettled in law, therefore meriting debate, but are also of general public importance and their resolution would bear important consequences. They deserve therefore, the constitution of a bench of Judges for hearing and determination.

### **Disposition**

45. I therefore certify that the matter be referred to the Chief Justice forthwith for the constitution of a bench in terms of **Article 165 (4)** of the **Constitution**.

46. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

2<sup>nd</sup> Petitioner – present

No appearance for Respondent

**Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**